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IN THE SUPREME COURT

OF THE STATE OF UTAH

EUGENE P. CAMPBELL,	)	
Plaintiff and Respondent,	)	
	)	Case No. 15912
vs.	)	
PEARL STAGG,	)	
Defendant and Appellant.	)	

APPELLANT'S BRIEF

Appeal from the Judgment of the
Seventh Judicial District Court of Carbon County
Honorable Boyd Bunnell

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FILED

JUL 31 1978

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

EUGENE P. CAMPBELL,)

Plaintiff and Respondent,)

)

vs. Case No. 15912

)

PEARL STAGG,)

Defendant and Appellant.)

BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiff brings this action against defendant to recover for personal injury.

Defendant claims that plaintiff entered into a contract with defendant's insurance company to settle plaintiff's claim and the contract is a bar to plaintiff's action.

Plaintiff claims that the contract was void or voidable because of a mutual mistake of fact between plaintiff and LaVell Brown, agent for State Farm Fire and Casualty Company.

Defendant claims that her insurance company was State Farm Mutual Automobile Insurance Company and that her insurance company is an indispensable party to this action.

Defendant claims the facts surrounding the execution

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of the instrument do not amount to a mutual mistake of fact.

Defendant claims that plaintiff, after signing the contract, by his conduct, further ratified the contract and should be estopped to deny its validity.

Defendant claims that the court erred in its application of Section 78-27-44, Utah Code Annotated, 1953, allowing interest on special damages retroactively.

DISPOSITION IN LOWER COURT

The lower court entered a money judgment against defendant although it failed to cancel the contract between plaintiff and defendant's insurance company.

The lower court in its findings determined that interest was due on special damages from the date of the injury, September 9, 1973, until March 10, 1978, in accordance with Utah Code Annotated, 1953, Section 78-27-44.

The court, in its conclusions, stated that State Farm Mutual Automobile Insurance Company was not a necessary party to the action.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the trial court's judgment.

STATEMENT OF FACTS

AS TO PLEADINGS:

Plaintiff's complaint was for damages for personal injury. R 3-4. The summons was dated the 20th of February, 1974, and served the 23rd of February, 1974.

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On March 15, 1974, defendant answered and as an affirmative defense plead that the contract entered into between plaintiff and State Farm Mutual Automobile Insurance Company was a bar to plaintiff's action. R-6

On the 29th of March, 1976, the court ordered, "that the plaintiff file an amendment to his complaint to plead the fact of the 'Agreement and Release' signed by the plaintiff and LaVell Brown on September 21, 1973--------said amendment is to reflect plaintiff's position as to said Agreement and Release'--------". R-54 In compliance with the court order, plaintiff amended his complaint by adding paragraph 7 and 8 that read: R-52

> 7. That an "Agreement and Release" was signed by the plaintiff on September 21, 1973, a copy of which is attached hereto and made a part of this Complaint as if fully set forth. Said Agreement was VOID or VOIDABLE by reason that there was a mutual mistake of fact between the plaintiff and LaVell Brown, agent for State Farm Fire and Casualty Company, as to the injuries suffered by the plaintiff on the 9th day of September, 1973. That the plaintiff in fact suffered certain injuries to his neck and spine and other areas of his body which were unknown to him or LaVell Brown at the time said "Agreement and Release" was signed.
>
> 8. That the plaintiff has properly and effectively voided said "Agreement and Release", and that said "Agreement and Release" is not a bar to his recovery in this action.

By leave of court, defendant amended her answer to plead; (1) release, (2) that the contract between plaintiff and State Farm Mutual Automobile Insurance Company amounted to a bar to the action; (3) that plaintiff had ratified the contract of September 21, 1973; and (4) further that he was estopped to deny

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the contract. R- 92 and 93

AS TO OBJECTION TO TRIAL UNTIL THE INDISPENSABLE PARTY WAS JOINED.

Before the commencement of the trial, on October 3, 1977, defendant's counsel informed the court that, in his opinion, the court could not proceed with the trial until the proper parties were named in the pleadings. Minute Entry dated October 3, 1977, found seven pages after R-536.

Written objection to the trial for the reason that there was an indispensable party was filed January 18, 1978. R-220

AS TO EXECUTION OF THE CONTRACT.

On September 21, 1973, LaVell Brown, agent for State Farm Mutual Automobile Insurance Company, and Eugene P. Campbell met in Helper, Utah for the purpose of settling Mr. Campbell's claim against Pearl Stagg.

LaVell Brown proposed a settlement of the entire matter for a sum of either $1600 or $1800 on a release basis. Tr-155, lines 12-25.

Mr. Campbell refused to settle on a complete release because as Mr. Campbell said, "When he gave me the document to sign the first one, it completely released them of any liability of any type to me. And I refused that. When he gave me the next one, Exhibit 28, I read it over. He helped me read it over. And I decided that because I had already been to Dr. Gorishek, they still hadn't determined what was wrong with me,

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whether it was going to be for a short period or a long period--then I decided I would go ahead and sign that one covering any expenses for the next couple of months". Tr 127-128

At the time the Agreement and Release was signed, Mr. Campbell understood State Farm Mutual Automobile Insurance Company had agreed to pay medical expenses as set forth in the document and to pay $72 per day as more fully set forth in the document. Tr-158 This was important to Mr. Campbell when he signed the document because of the payment of future medical bills and wages. Tr-159

Mr. Campbell did not attempt to contact Mrs. Stagg at any time. Tr-153. Mr. Campbell was of the opinion that his business was with the insurance company, not Mrs. Stagg. Tr-153.

At the time of the signing of the Agreement and Release, on September 21, 1973, Mr. Brown's impression, as shown by his report of September 21, 1973, as to Mr. Campbell's condition was, "bruises and cervical sprain". Tr-84 Mr. Brown's definition of a cervical sprain is, "I believe a cervical sprain to be a stretching of the neck muscles causing a pain--trauma to the neck". Tr-85. Mr. Brown recorded in his Filing Sheet, Bodily Injury Claims, "Coverage A & B closed, payment on open release. I did not have medical bills. To be paid when received. Low estimate $771.39 plus steering column and tire. I allowed $850.00. When I left for Price last night I thought I would be able to settle on Blue Release. Claimant is still under Doctor's care with neck and back so I negotiated an open release". Exhibit 29

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Mr. Brown said at trial, "Because he (Mr. Campbell) wasn't sure about his neck or injuries or what he might have. So we then discussed and worked out the settlement that we did on the other release, which we referred to it as an open release because it leaves the medical coverage open and the loss of wages open within a specified limit". Tr-87

MR. CAMPBELL KEPT A COPY OF THE CONTRACT UNTIL HE TOOK IT TO HIS ATTORNEY IN DECEMBER, 1973.

Eugene P. Campbell was given a copy of the Agreement a[illegible] Release after it was signed on September 21, 1973. Mr. Campbell kept the Agreement and Release in his possession until December [illegible] of 1973, when he took it to his Attorney, Jackson Howard. Tr-1[illegible]

AFTER SEPTEMBER 21, 1973, MR. CAMPBELL CONTINUED TO ASK FOR THE BENEFITS PROVIDED FOR IN THE CONTRACT AND THE INSURANCE COMPANY KEPT PAYING.

Mr. Campbell had not cashed the Draft given to him on September 21, 1973, by Mr. Brown, at the time he went to Dr. Gor-ishek on September 26, 1973.

On September 30, 1973, Mr. Campbell wrote to Mr. Brown as follows:

> I would like to let you know what has transpired this past week.
>
> The check you gave me on 9-21-73 as you know, had to be cleared thru another bank, causing me lost time and great embarrassment.
>
> I was to buy a car from a fellow worker on Wed. 9-26-73. We both left work at 1:00 p.m. on 9-26-73,

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and met at the Walker Bank in Price. As you know what would happen, they could not cash the check and I could not buy the car.

Now this has left me afoot for an additional seven to ten days while the check clears, plus the work hours lost on the job.

I don't want to thank you for all this inconvenience but I do expect prompt compensation for my loss two hours @ $9.00 per hour.

On the same day 9-26-73, I had an appointment with Dr. Gorishek. Lost hours for this appointment amounted to one (1) hour of straight time pay @ $9.00 per hour plus two (2) hours of double time pay @ $16.50 per hour.

I also had to buy another prescription @ $4.55 from Kelley's Drug Store.

I feel I should also be compensated for an additional six days without a car at $8.00 a day = $48.00.

This grand total comes to $112.55 that I feel State Farm Ins. Co. can pay.

You can send me a check, one I can cash, or stop by my apartment.

Signed, Eugene P. Campbell Ex. 57

The draft given to Mr. Campbell by Mr. Brown on September 21, 1973, was sent for collection by Walker Bank and Trust Company, Price, Utah, and not paid by The Greeley National Bank, Greeley, Colorado, until October 1, 1973. Exhibit 56.

Mr. Campbell continued to go to doctors in connection with his neck injury and ran up medical bills which he would submit to the insurance company. Exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68. As late as December 3, 1973, Mr. Campbell verified his wage loss and wrote Mr. Brown. Exhibit 60

After the original draft was negotiated, Eugene P. Camp-

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bell received, endorsed and negotiated drafts as follows:

Draft #449 101 Q, dated 10/15/73 in the amount of $20.00

Draft #449 102 Q, dated 10/15/73 in the amount of $13.50

Draft #449 112 Q, dated 10/29/73 in the amount of $4.35

Draft #435 367 Q, dated 12/13/73 in the amount of $19.00

Draft #449 178 Q, dated 12/31/73 in the amount of $20.00

Draft #449 188 Q, dated 1/12/74 in the amount of $74.50

Draft #449 244 Q, dated 2/5/74 in the amount of $33.50

Draft #449 245 Q, dated 2/5/74 in the amount of $25.00

Draft #457 960 Q, dated 2/21/74 in the amount of $147.00

Draft #457 961 Q, dated 2/21/74 in the amount of $78.00

Draft #457 962 Q, dated 2/21/74 in the amount of $49.00

Draft #457 963 Q, dated 2/21/74 in the amount of $1349.70

Draft #457 964 Q, dated 2/21/74 in the amount of $13.53

Draft #457 965 Q, dated 2/21/74 in the amount of $1027.50

AS TO MR. CAMPBELL'S MEDICAL CONDITION.

September 9, 1973

At 2:45 p.m. on September 9, 1973, plaintiff, Eugene P. Campbell, presented himself to the Outpatient and Emergency Service of the Carbon Hospital for medical attention.

Dr. William Gorishek was called to give medical attention to plaintiff, Eugene P. Campbell. Plaintiff, Eugene P. Campbell, gave Dr. Gorishek a medical history on September 9, 1973, of having been involved in an automobile accident and as a result suffered pain in his neck, headache, swelling of the right elbow and left knee. Exhibit 39. Tr-16.

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Dr. Gorishek, on September 9, 1973, examined the person of Eugene P. Campbell and ordered x-rays of parts of Mr. Campbell's body. Tr-23 The clinical examination showed spasm in the tissues of the neck, Tr-33, and limitation of motion in all directions, to-wit: lateral, rotation, flexion, extension, Tr-34, and soreness and stiffness in his neck. Tr-41

The x-ray of the neck and thoracic spine showed:

> "The patient shows straightening in the neck region. Arthritic changes are apparent, with both anterior and some posterior spurring. T-7 is wedged, though the characteristics of this is a remote change. No other possible acute wedge fractures are identified. There is somewhat more arthritic change in the thoracic spine than expected in a 42 year old man.
>
> Both thoracic and cervical spines show more arthritic changes than expected. There is posterior spurring of significant degree in the cervical region with moderately advanced arthritic changes at several levels. T-7 is wedged, but this appears to be old most likely." Exhibit 39

After examining Mr. Campbell, Dr. Gorishek, on September 9, 1973, reached a diagnosis of Mr. Campbell's condition of a cervical strain. Exhibit 39 Dr. Gorishek's definition of a cervical strain is "excessive stretching or over exertion of the muscles and other soft tissue in the cervical area". Tr-39, lines 14-17. Soft tissues in the cervical area consist of muscles, Tr-24; ligaments, Tr-25; veins, Tr-26; arteries, Tr-27; nerves, Tr-28; nerve root, Tr-30; and cervical discs, Tr-32.

On September 9, 1973, Dr. Gorishek told Mr. Campbell, "He had a soft tissue injury and probably a strain that would eventually clear up by itself, at least with treatment. If

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symptoms persisted and became worse, then further studies were indicated." Tr-19, lines 7-10.

Dr. Gorishek on September 9, 1973, prescribed a muscle relaxant and pain medication for Mr. Campbell and advised him in addition to taking the prescription drugs, to apply heat to his neck as well as massaging the muscle. Tr-17, lines 6-8.

On September 9, 1973, Dr. Gorishek believed Mr. Campbell's condition to more or less of a minor nature. Tr-17, lines 17-19.

On September 9, 1973, Mr. Campbell's neck was mostly sore on the left side.

On September 9, 1973, Dr. Gorishek believed that the muscles and ligaments of Mr. Campbell's neck were injured. Tr-2[illegible]

On September 9, 1973, there was no way at that point to determine the extent of the damage to his nerves. Tr-28 Compression of a nerve root may cause pain. Pressure on a nerve, regardless of the location, may cause pain through the various fiber tracts within the nerve itself. Tr-29 Pain which is caused by irritation of the nerve roots is always accompanied by muscle spasm. Tr-34

The x-rays that were taken at the hospital on September 9, 1973, showed a straightening of the curve in the neck. Tr-35. Dr. Gorishek stated in regard to this condition, "With the straightening of the cervical neck, a portion of the neck, it means that the muscles are guarding and tending to straighten out the

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cervical spine from its usual normal curvature." Tr-35

The x-rays of September 9, 1973, showed the anterior spurring in the cervical area. Tr-35. This was significant to Dr. Gorishek because the spurring--even in a slight trauma, could force back against the nerve roots and cause pain and discomfort. Tr-36.

As of September 9, 1973, the pain in Mr. Campbell's neck could have been caused by a cervical disc being pooched out a little. Tr-42.

September 19, 1973

Dr. Gorishek next saw Mr. Campbell on September 19, 1973. The symptoms and signs were the same including the soreness on the left side. Tr-44.

On September 19, 1973, Dr. Gorishek prescribed a cervical collar. The purpose of the cervical collar was to support the structure of the neck, to splint the neck, to splint and immobilize the neck. Tr-45.

Dr. Gorishek stated upon questioning that he, Dr. Gorishek, knew that Mr. Campbell had an injury to his neck but the consequences of the injury turned out worse than he originally thought. To put it another way, Dr. Gorishek said he knew that Mr. Campbell had an injury to his neck but the exact nature of the injury was unknown. Tr-59-60.

Eugene P. Campbell admits at the time that Dr. Gorishek prescribed the neck collar, September 19, 1973, he was having considerable pain and discomfort with his neck. Tr-143. Mr.

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Campbell took off a half a day's work on the 19th of September, 1973, to go see Dr. Gorishek because he was having difficulty. Tr-144.

September 26, 1973

Dr. Gorishek next saw Mr. Campbell on September 26, 1973. The symptoms and signs were the same. Tr-46.

On September 26, 1973, Dr. Gorishek further treated Mr. Campbell by the injection of Xylocaine, a local anesthetic to relieve pain, and Indicin, a medication used to relieve pain produced by arthritis. Tr-46-47.

By September 26, 1973, Dr. Gorishek suspected that Mr. Campbell's pain and discomfort was arthritis aggravated by trauma. Tr-47-48.

October 30, 1973

Dr. Gorishek next saw Mr. Campbell on October 30, 1973. Mr. Campbell still had the same symptoms of pain, discomfort and soreness in his neck. Tr-49.

November 13, 1973

On November 13, 1973, Mr. Campbell's symptoms and signs were exactly the same except Mr. Campbell was having some left arm soreness. Tr-49.

December 7, 1973

On December 7, 1973, Dr. Gorishek made a diagnosis of possible advanced arthritis with nerve root irritation. Tr-50. It was Dr. Gorishek's opinion that the pathogenic condition of Mr. Campbell's neck was undoubtedly the same September 9, 1973,

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as it was December 7, 1973. Tr-50. Pathogenic being defined by Dr. Gorishek as "the cause of the illness or symptom". Tr-51.

December 19, 1973

After Dr. William Gorishek treated Mr. Campbell, he was treated by Dr. Robert H. Lamb. Dr. Lamb had Mr. Campbell admitted to the St. Mark's Hospital on December 19, 1973. On December 19, 1973, Mr. Campbell gave a medical history to Dr. Lamb as follows:

> "The patient was involved in an accident 3½ years ago when he fell two stories injuring his back and neck. The patient has had the onset of sensation in the left hand in the ulnar nerve distribution and more recently in the median nerve distribution. The patient also describes a sensation of a vague pain under the left shoulder on the left which radiates down the lateral aspect of the arm. The patient denies any weakness.: Exh. 40

Mr. Campbell was seen in consultation by Dr. Thoen, who felt he had a herniated cervical disc and suggested initial conservative therapy.

On the hospitalization commencing December 19, 1973, Mr. Campbell gave Dr. Thoen the following history:

> "This 42 year old man was admitted because of pain in the neck and the left arm since several months ago when he was involved in an automobile accident. He was severely shaken up by the injury. His neck has been stiff and aching ever since. He has had pain running into the left shoulder and down the left arm into the 3rd, 4th and 5th digits of the left hand but more common in the 3rd and 4th. It is accentuated by certain movements of the head and neck but not by coughing or sneezing."

A cervical myelogram was performed and revealed some lack of filling of the left nerve root pouch of C5-6 with a transverse ridge like filling defect across the C5-6 interspace. The

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patient was treated conservatively and gradually responded. Ex..

Mr. Campbell was discharged January 4, 1974, with a final diagnosis of cervical disc syndrome.

September 2-11, 1974

Mr. Campbell continued to have problems involving his neck and was therefore admitted to the St. Mark's Hospital on September 2, 1974 and discharged September 11, 1974, Exhibit 41, for the purpose of an operation known as an anterior C5-6 disc and fusion. Prior to the operation the diagnostic aid of a cervical myelogram was used which showed:

> "The C-5/6 ventral and central defect is associate with osteophyte indentation at the C-5/6 level. The C-5/6 joint space is narrowed. The root sleeves are preserved in all cervical levels."

The radiologist, Richard R. Flynn, M.D. had the following impression:

> "Cervical ventral column defect is located at the C-5/6 level following the contour of posterior spurs. In retrospect, the myelogram study of 12-22-73 was predominantly subdural accounting for the peculiar cervical appearance, observed at this study."

Report of myelogram, Exhibit 41.

It is the opinion of Dr. Thoen that "any herniated disc, thoracic outlet syndrome that may result from a hyper extension injury would initially present itself as a cervical strain and would be almost impossible to distinguish one from the other unless one were a neurologist and examined the patient." Tr-189.

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ARGUMENT

POINT I

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY IS A NECESSARY AND INDISPENSABLE PARTY TO THIS ACTION.

Eugene P. Campbell, plaintiff, admits that he settled his claim for personal injury and property damage against the defendant, Pearl Stagg, by entering into a contract with defendant's insurance company, State Farm Mutual Automobile Insurance Company. Plaintiff claims there was a mutual mistake of fact between the insurance company's agent and plaintiff, as to the nature and extent of his injuries. Plaintiff, in his complaint, states plaintiff has properly and effectively voided said "Agreement and Release." R-52. Plaintiff's final Amended Complaint has no reference whatsoever to the contract between plaintiff and defendant's insurance company. R-109.

To rescind a contract the trial court, of necessity, would apply equitable principles. To rescind a contract all parties interested in the contract must be joined. State Farm Mutual Automobile Insurance Company, as the insurer of defendant, has an interest and is one contracting party of the contract that would have to be set aside.

> "A court cannot adjudicate directly upon the rights of a person without having him either actually or constructively before it. As a general rule, there can be no binding adjudication of a person's rights in the absence of that person,...Accordingly, it is a general rule that every person whose rights it is sought to adjudicate in an action must be joined therein...
> Although one party has brought an action against another, if there is a failure to join therein certain other parties, the court will not, or, as some courts have stated, cannot, proceed with the litigation or

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proceed to a final decision, and hence such persons are designated "indispensable" or "necessary" parties, although some courts use the term "necessary" in a sense less absolute than that in which they use the term, "indispensable".

The burden of procuring the presence of all such indispensable parties is on the plaintiff." Parties

59 Am Jur 2d 483-484, Sec. 96.

"It frequently is said that persons who are indispensable parties and must be joined as parties of record are those whose interests are such that no final decree between the parties before the court which would do justice between them can be made without leaving the controversy in such a situation that its final determination may be wholly inconsistent with equity and good conscience." Parties

59 Am Jur 2d 487, Sec. 96.

"The rules of equity with reference to parties control in a suit wherein plaintiff seeks to enforce equitable rights through the equitable remedy of cancellation or rescission. All persons whose rights, interests, or relations with or through the subject matter of the suit would be affected by the cancellation or rescission are proper and necessary parties in order that they may have an opportunity to be heard; and unless they are made parties the court is precluded from rendering a judgment or decree of cancellation. Where such persons are not made parties originally, they may be brought in by amendment; but until the omission is corrected the court should not proceed further, even though no objection is made by any party litigant." Cancellation

of Instruments, 12 C.J.S. Sec. 52, 1027-1028.

A decision of the Supreme Court of the United States for the December Term 1854, Shields vs. Barrow, 17 H, 411, announces the general rule. There are

"three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly

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termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties."

Utah follows the general rule announced in the Shields vs. Barrow case, supra.

Our Utah Court in the case of Houser vs. Smith et al. 19 Utah 150; 56 P. 683 (1899) states:

> "Courts have no right to dispose of and adjudicate upon property rights of persons not parties to the case and strangers to the record, and a judgment rendered against persons not parties to the action, and over whom the court acquired no jurisdiction, is absolutely void as to them."

State Farm Mutual Automobile Insurance Company had a contract right in its settlement agreement with plaintiff and the court should not adjudicate upon this property right without having State Farm Mutual Automobile Insurance Company before it.

In the Utah case of South Kamas Irrigation Company vs.

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Provo River Water Users' Association, 10 Utah 2d 225, 350 P.2d 851 (1960) the plaintiff attempted to have an adjudication of its right to use a tunnel. The plaintiff recognized that such a judgment in and of itself would not be sufficient to require the defendant to allow the use of its tunnel in the absence of consent of the United States. The United States would not conse to be named as a party in the action. The court said in view of the fact that the judgment which the plaintiff seeks against the defendant cannot be enforced against it without enforcing it against the United States, the United States is an indispensable party to this action and its sovereign immunity should be upheld.

Plaintiff, Eugene P. Campbell, could not enforce any rights that he obtained against Pearl Stagg without effecting the rights of State Farm Mutual Automobile Insurance Company. Certainly State Farm Mutual Automobile Insurance Company is an indispensable party to this action.

Our Utah Court speaking on necessary parties in the case of Stone vs. Salt Lake City, et al. 11 Utah 2d 196; 356 P.2d 631 (1960) states:

> "One should be regarded as a necessary party to a lawsuit if he has rights or interests involved in the subject matter in such a way that his presence is essential to a full, fair and equitable determination of his rights and those of other parties to the suit, and necessary parties include the grantees of a deed, in an action in which the validity of such deed is under attack."

Another Utah Case handling the matter of an indispensable party puts it somewhat differently. In the case of State Farm

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Mutual Insurance Company vs. Jack B. Holt, 531 P.2d 495 (1975) State Farm Mutual Insurance Company brought an action for a declaratory judgment against the person it contracted the insurance with, a person to whom the insured vehicle had been sold and persons who had been injured by the insured vehicle. The Supreme Court held that there was coverage on the automobile in question. The injured persons showing to the trial court that their injury was much greater than the coverage, made a motion to split up the twenty thousand dollar coverage. The tort feasor, or the person driving the insured vehicle, although named in the lawsuit, was never served. The court answered the claims of the injured persons by stating that the tort feasor had a right to be heard before the judgment could be found against him. The court pointed out that if the injured persons wanted money from the insurance company they must either accept settlement with the insurance company or sue the tort feasor.

In this case, Eugene P. Campbell, plaintiff has accepted an offer from the insurance company and entered into a written contract, but in plaintiff's action to set aside the contract fails to join the insurance company.

California, in Bank of California Nat. Ass'n. et al v. Superior Court in and for City and County of San Francisco et al., 106 P.2d 879 (1940) addressing itself to indispensable parties who want affirmative relief, such as the cancellation of an instrument, states:

"Where plaintiff seeks some type of affirmative relief

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which, if granted, would injure or affect the interests of a third person not joined, the third person is an "indispensable party".

A court which attempts to proceed in an action when indispensable parties are not before the court acts beyond its jurisdiction and may be restrained by prohibition."

POINT II

AS A MATTER OF LAW, THE CONTINUING VALIDITY OF THE RELEASE AS TO STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY OPERATES TO DISCHARGE AND RELEASE THE DEFENDANT FROM ANY LIABILITY IN THE PRESENT ACTION.

Recent decisions by the Utah Supreme Court have held that a release is broad enough to bar recovery not only by the parties to the contractual release, but also by parties excluded from the express language of the release contract.

In Holmstead v. Abbott G.M. Diesel, Inc., 27 Utah 2d 109; 493 P.2d 625 (1972) it states:

> "Action against corporation alleging that its employee, while operating motor vehicle within scope of his employment, negligently collided with plaintiff's vehicle, causing plaintiff injuries and property loss, wherein defendant moved for summary judgment on ground that plaintiff's covenant not to sue employee operated as matter of law to release defendant from liability and, prior to hearing on motion, plaintiff filed action against employee and his carrier for reformation of covenant not to sue. The Fourth District Court, Utah County, Joseph E. Nelson, J., granted decree of reformation, denied defendant's motion for summary judgment and granted defendant's petition for intermediate appeal. The Supreme Court, held that where covenant not to sue specified that injured plaintiff understood that agreement was to terminate further controversy respecting all claims for damages which plaintiff had asserted or that he or his personal representatives might thereafter

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assert against negligent employee, the covenant constituted a complete exoneration of employee and removed any foundation upon which to impute negligence to employer, whose liability was derivative and secondary, and plaintiff was not entitled to maintain action against employer."

A year later in Williams v. Green 29 Utah 2d 141; 506 P.2d 64 (1973) the court extended the protection of a release to a doctor who was not a party to the release contract. The plaintiff suffered an injury while at work for an oil company and the defendant doctor treated his injuries. Subsequently the plaintiff negotiated and settled his claim against his employer by executing a release with the employer for all damages which may develop in the future as a result of the injury. Two years after the injury the plaintiff attempted to bring this action against the doctor claiming damages for the same injuries he had previously settled with the employer. The court held as a matter of law (by sustaining the defendant's motion for summary judgment) that the plaintiff could not maintain his cause of action against the defendant doctor on the bare assertion that the release was not intended to include the claim against the doctor.

Finally, in 1974, the Utah Supreme Court announced their decision in Catmull v. Medical Integrated Systems, Inc. 30 Utah 2d 334; 517 P.2d 1023. This case came to the Supreme Court on appeal from the trial court's granting of summary judgment in favor of the defendant. Plaintiff's child had been swimming at the Hygeia Ice Company pool in Sugarhouse and was found lying at the bottom of the pool. The lifeguards gave the child

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mouth-to-mouth resuscitation until the defendant's ambulance arrived. The controverted fact was whether or not the child was revived or dead at the time the ambulance arrived. The evidence is uncontroverted however, that the child was dead on arrival at the hospital. Plaintiffs, through negotiations by their attorney, entered into a release contract with the Hygeia Ice Company releasing and forever discharging the said Hygeia Ice Company of and from any and all claims, foreseen and unforeseen and the consequences thereof.

In this action against the Ambulance company the plaintiffs claim that the release executed with the Hygeia Ice Company ran only to that company. In answer to this allegation the Supreme Court affirmed the trial court's decision to grant summary judgment for the defendant by holding that:

> "Inasmuch as it appears that the plaintiffs had accepted the settlement and released their claim for their loss from the death of their son, the trial court was justified in his determination that there remained to them no further cause of action on which to maintain this suit against the defendant ambulance company."

The three Utah cases cited above apply to the factual situation at hand only by analogy. In each of the cases mentioned the court, as a matter of law, allows the release contract to extend to parties that are not involved in the written instrument and bars recovery by the release against such parties. The court released the employer because of the release affecting the employee and the doctor discharged because of the release to the employer, and the ambulance company was exonerated from liability because of the

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release of the swimming pool owner.

In the case at hand the connection between the released party, State Farm Mutual Automobile Insurance Company, and the defendant is much closer--the defendant is a party to the contract. As long as the release remains valid as to State Farm Mutual Automobile Insurance Company, the defendant is also released as to liability because the release cannot be set aside until all parties thereto are brought into the action. Three distinct factors illustrate the close connectedness between the party released and the defendant:

A. The Release Contract - The plaintiff, defendant, and State Farm Mutual Automobile Insurance Company are all parties to the release contract and the release as to one constitutes a release as to all. Exhibit 28

B. Insurance Contract - The first paragraph of Section I of the insurance contract between the defendant and State Farm Mutual Automobile Insurance Company expressly gives State Farm Mutual Automobile Insurance Company the right to negotiate and settle the plaintiff's claim and as a result of the execution of the release State Farm Mutual Automobile Insurance Company became a direct party to the release, therefore, as long as the release remains valid as to the insurance company it remains valid and effective as to the defendant. Exhibit 81

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C. Plaintiff's Negotiations - Plaintiff's affirmative steps to negotiate with the absent insurance company and to settle with them as a party to the contract clearly show that the release is valid as to the insurance company. Tr 158-159 Exhibits 34 and 35

Defendant claims that since the release of the employee supported release of the employer, release of the company allowed release of the doctor and release of the swimming pool owner was a sufficient release of the ambulance company then a fortiori release of the insurer, State Farm Mutual Automobile Insurance Company, must constitute release of the insured defendant.

The Constitution of Utah, Article I Sec. 7, provides as follows:

> "No person shall be deprived of life, liberty or property, without due process of law."

The comparable section of the Constitution of the United States of America is Amendment XIV Sec. 1 provides as follows:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The contract right with plaintiff, Eugene P. Campbell, as to State Farm Mutual Automobile Insurance Company would be a property right.

The Utah Court in the case of Parry v. Bonneville Irr. Dist. et al, 263 P. 751 (1928) states:

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> "It is of course an elementary rule of law that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of the judicial tribunal about to render judgment."

It would be difficult to see how the right could be extinguished as to State Farm Mutual Automobile Insurance Company without the court having jurisdiction of the company.

Other Utah cases have dealt with this subject. The case of Naisbitt v. Herrick et al, 290 P. 950 (1930) states:

> "'Due process' requires that judgment affecting property be based on service of process calculated to give notice."

Denver & Rio Grande Western R. Co. v. Industrial Commission of Utah et al, 279 P. 612 (1929) states it:

> "Notice and an opportunity to be heard are elementary requirements of due process of law, when the rights of a party are to be affected by judicial proceeding."

The cancellation of the contract as to State Farm Mutual Automobile Insurance Company without obtaining jurisdiction of State Farm Mutual Automobile Insurance Company would be void as being unconstitutional.

The Texas court, in a 1955 case, held that the insurance company had a vested right in the contract of release of the insured even though the release was an absolute release and the insurance company was not named in the instrument as a contracting party. Pattison v. Highway Insurance Underwriters, 278 S.W. 2d 207.

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POINT III

THERE WAS NO MUTUAL MISTAKE OF FACT BETWEEN THE PLAINTIFF AND LaVELL BROWN, AGENT FOR THE INSURANCE COMPANY, AS TO THE FACT THAT PLAINTIFF SUFFERED AN INJURY TO HIS NECK AND SPINE.

AS TO THE PLEADINGS:

Rule 8 (a) of Utah Rules of Civil Procedure provides as follows:

> "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

Rule 9 (b) of Utah Rules of Civil Procedure provides as follows:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Our Utah court in the case of Heathman v. Hatch, 13 Utah 2d 266; 372 P.2d 990 (1962) states:

> "The basic facts must be set forth with sufficient particularity to show what facts are claimed to constitute such charges."

The court also states:

> "The objective of these rules is to require that the essential facts upon which redress is sought

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> be set forth with simplicity, brevity, clarity and certainty so that it can be determined whether there exists a legal basis for the relief claimed; and, if so, so that there will be a clearly defined foundation upon which further proceedings by way of responsive pleadings and/or trial can go forward in an orderly manner."

The pleading by Mr. Campbell as to mistake was:

> "Said Agreement was VOID or VOIDABLE by reason that there was a mutual mistake of fact between the plaintiff and LaVell Brown, agent for State Farm Fire and Casualty Company, as to the injuries suffered by the plaintiff on the 9th day of September, 1973. That the plaintiff in fact suffered certain injuries to his neck and spine and other areas of his body which were unknown to him or LaVell Brown at the time said "Agreement and Release" was signed."

Plaintiff claimed that he had a neck and spine injury that was unknown to LaVell Brown, agent for State Farm Mutual Automobile Insurance Company and himself as of September 21, 1973.

AS TO WHAT FACTS MAY BE REVIEWED:

The court may review the facts as to that portion of the complaint asking a cancellation of the contract with State Farm Mutual Automobile Insurance Company because the matter of cancellation deals with equity.

> "In equity cases the appeal may be on questions of both law and fact." Constitution of Utah, Article 8, Section 9.

This same provision is restated in the Utah Rules of Civil Procedure, Rule 72 and by the pronouncements of the court, ie Ream v. Fitzen, filed June 13, 1978, Utah Supreme Court File No. 15220.

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AS TO THE DEGREE OF PROOF REQUIRED TO CANCEL A CONTRACT BECAUSE OF MISTAKE:

The degree of proof required to cancel a contract because of mistake is different than the degree of proof in the ordinary civil case. Listed below are three Utah cases which define the degree of proof required.

> Evidence to sustain mutual mistake of fact must be clear, definite and convincing and party asserting it should not be guilty of negligence in execution of contract. Ellison v. Johnson, 18 Utah 2d 374; 423 P.2d 657.
>
> To prove such a mistake as will avoid the effects of a written contract, evidence must be clear and convincing. Paulsen v. Coombs, 123 Utah 49, 253 P. 2d 621.
>
> If there is no doubt that both parties contracted in light of a belief that a certain situation or condition was true and it is claimed by one party that their belief was in fact a mistaken belief, latter must prove by clear, unequivocal and convincing evidence that situation or condition in reliance on which contract was made, was at time of making thereof different from that which both parties supposed or believed it to be. Kirchgestner v. Denver & R.G.W.R. Co., 118 Utah 41; 233 P.2d 699.

AS TO THE PUBLIC POLICY FOR GIVING EFFECT TO CONTRACTS:

The general consideration of the law is to give effect to the agreements contained in parties contracts. The Utah court has spoken on this subject on many occasions. Below are listed cases outlining this general theory in our law.

In absence of compelling considerations of policy

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to contrary, it is duty of court to give effect to covenants to which parties have agreed in their contracts. Lundstrom v. Radio Corp. of America, 17 Utah 2d 114; 405 P.2d 339.

People should be entitled to contract on their own terms without indulgence of paternalism by courts in alleviation of one side or another from the effects of a bad bargain. Carlson v. Hamilton, 8 Utah 2d 272; 332 P.2d 989.

Persons should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side, and it is only where it turns out that one side or the other is to be penalized by enforcement of the contract so unconscionable that no fair-minded person would view the ensuing result without a profound sense of injustice, that equity will deny the use of its jurisdiction in enforcement of such unconscionability. Id.

It is not the function of the court to renegotiate a contract of the parties. Id.

The purpose of contract is to reduce to writing the conditions upon which the minds of the parties have met and to fix their rights and duties in respect thereto, and intent so expressed is to be found, if possible, within the four corners of instrument itself in accordance with ordinary accepted meaning of words used. Ephraim Theatre Co. v. Hawk, 7 Utah 2d 163; 321 P.2d 221.

Even if a contract is ill advised and burdensome, court cannot make a new contract for the parties. Tooele City v. Settlement Canyon Irr. Co., 4 Utah 2d 215; 291 P.2d 881.

AS TO APPLYING THE ABOVE BASIC PRINCIPLES TO THE FACTS OF THIS CASE:

Plaintiff, Eugene P. Campbell, and LaVell Brown, agent for State Farm Mutual Automobile Insurance Company, negotiated at length to reach an acceptable agreement because plaintiff was

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still under the doctor's care with his neck and back. The agreement called for substantial medical and wage loss benefits. Each party to the contract kept a copy and Mr. Campbell had his copy in his possession until December of 1973, when he took it to his attorney, Jackson Howard. See more complete statements in this Brief, pages 4, 5, and 6.

Mr. Campbell, immediately after the accident in question went to the Carbon Hospital, where he gave a history of being injured in an automobile accident, suffering pain in his neck and having headaches. Dr. Gorishek examined Mr. Campbell and found spasm in the tissues of the neck, limitation of motion in the neck in all directions, and radiographic evidence of acute injury and chronic degeneration. Dr. Gorishek reached the diagnosis of cervical sprain. Dr. Gorishek prescribed a muscle relaxant and pain medication and advised Mr. Campbell to apply heat to his neck. Dr. Gorishek next saw Mr. Campbell on the 19th of September, 1973, and found his condition substantially the same. Dr. Gorishek knew that Mr. Campbell had an injury to his neck, but the consequences of the injury turned out worse than he originally thought. See more complete statements in this Brief, pages 8, 9, 10, and 11.

The evidence is to the effect that it was a soft tissue injury and as stated by Dr. Gorishek, Tr-50, "the path-ogenic condition of Mr. Campbell's neck was undoubtedly the same September 9, 1973, as it was December 7, 1973". Pathogenic

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being defined by Dr. Gorishek as, "the cause of the illness or symptom". Tr-51.

The evidence is overwhelming that Eugene P. Campbell and LaVell Brown, at the time the document was executed were well aware of the injury to Mr. Campbell's neck and spine. After the meeting with Mr. Campbell, LaVell Brown wrote:

> "Claimant is still under doctor's care with neck and back so I negotiated an open release." Exhibit 29

Mr. Campbell, of course, stated in his original history on the day of the accident that he was suffering from pain in his neck. Exhibit 39. Tr-16. Eugene P. Campbell admitted on September 19, 1973, two days before the release was executed, that he was having considerable pain and discomfort in his neck. Tr-143. In fact, he took off a half day's work on the 19th of September, 1973, to see Dr. Gorishek because he was having difficulty. Tr-144.

The contract itself contemplated further medical expenses and loss of wages.

Eugene P. Campbell received an immediate cash settlement which was satisfactory when made and he further received a very substantial written protection against the eventuality that occurred. Furthermore, Mr. Campbell availed himself of the contractual benefits.

As said about Carrie M. Carter, in the case of Carter v. Kingsford, 557 P.2d 1005, there can be no question that after the accident Mr. Campbell knew and was informed that he had an

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injury to his neck. This is without a doubt a case in which a release was given for a known neck injury, the future of which was speculative.

The syllabus of Carter vs. Kingsford, heretofore referred to, reads as follows:

> "Where, at time of accident, diagnosis was "cervical strain, strain of left shoulder and superficial abrasions," and it was indicated that X-rays and analysis indicated slight degenerative disc disease at C-5 and 6 but at that time there was no reason for prognosis of any necessary or possible surgical repair, and thus plaintiff knew she had injury to her neck, her subsequent troubles were "unknown consequences of a known injury" which did not authorize avoidance of release."

Defendant's contention is that Mr. Campbell's injury fell clearly within the principle announced in the Carter vs. Kingsford case. The overwhelming evidence as to Mr. Campbell's and Mr. Brown's knowledge of the neck injury is only strengthened by the form of the contract entered into between State Farm Mutual Automobile Insurance Company and Eugene P. Campbell, which contemplated further expense in connection with the injury.

POINT IV

PLAINTIFF, EUGENE P. CAMPBELL, BY HIS CONDUCT AFTER SEPTEMBER 21, 1973, RATIFIED THE CONTRACT BETWEEN HIMSELF AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

AS TO SIGNING CONTRACT:

On September 21, 1973, LaVell Brown, agent for State Farm Mutual Automobile Insurance Company and Eugene P. Campbell

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met in Helper, Utah for the purpose of settling Mr. Campbell's claim against Pearl Stagg.

LaVell Brown proposed the settlement of the entire matter for a sum of either $1600 or $1800 on a release basis. Tr-155, lines 12-25.

Mr. Campbell refused to settle on a complete release because Mr. Campbell knew that he had an injury, but he did not know the extent of his injury and he wanted to protect himself for future medical expenses and loss of wages. Tr-127-128. The provision for medical expenses and loss of wages were important to him at the time he signed the contract. Tr-158-159.

Mr. Campbell was given a copy of the contract after it was signed on September 21, 1973.

AS TO MR. CAMPBELL'S INJURY:

Up until December, 1973, Mr. Campbell's condition remained fairly static as he continued treatment under Dr. Gorishek. For a more complete detail of the fact situation as to the medical condition of Mr. Campbell, see his medical condition outlined in this Brief, pages 8-14.

From December 19, 1973, to January 4, 1974, plaintiff was in the St. Mark's Hospital being treated daily by several doctors, Exhibit 40, the same being the hospital records for the December, 1973, hospitalization.

AS TO ACCEPTANCE OF BENEFITS AS PROVIDED FOR IN THE CONTRACT:

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The draft given to Mr. Campbell by Mr. Brown on September 21, 1973, was sent for collection by Walker Bank and Trust Company, Price, Utah, and not paid by The Greeley National Bank, Greeley, Colorado, until October 1, 1973. Exhibit 56.

Mr. Campbell continued to go to doctors in connection with his neck injury and ran up medical bills which he would submit to the insurance company for payment under the provisions of the contract. Exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68.

Plaintiff continued to negotiate the drafts issued by State Farm Mutual Automobile Insurance Company after the lawsuit had been filed but before Pearl Stagg had been served.

AS TO APPLICABLE LAW:

If an injured person executes a contract of release, which was sufficiently clear as to be understandable by a person of ordinary intelligence, continues to have a copy of it in his possession at all times, confers with his lawyer in regard to the contract and continues to receive benefits, he then as a matter of law ratifies the contract. See Wells v. Evans Products Company, 446 P.2d 108.

The companion case of Wells v. Mix, 512 P.2d 788 (1973) reaffirms the rule as follows:

> "Ratification of a release occurs when the releasor, with full knowledge of the facts entitling him to rescind, engages in unequivocal conduct giving rise to a reasonable

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inference that he intended the conduct to amount to ratification."

POINT V

THE TRIAL COURT, IN ERROR, HAS APPLIED UTAH CODE ANNOTATED, 1953, AS AMENDED, SECTION 78-27-44, ALLOWING INTEREST ON SPECIAL DAMAGES RETROACTIVELY CONTRARY TO UTAH CODE ANNOTATED, 1953, SECTION 68-3-3, WHICH PROVIDES: "NO PART OF THESE REVISED STATUTES IS RETROACTIVE UNLESS EXPRESSLY SO DECLARED."

The trial court made a finding that interest on special damages was due from the date of the injury, September 9, 1973, until March 10, 1978, the same being $6,611.75, in accordance with Utah Code Annotated, 1953, Section 78-27-44. R-526.

Utah Code Annotated, 1953, as amended, Section 78-27-44 provides as follows:

> "In all actions brought to recover damages for personal injuries sustained by any person, resulting from or occasioned by the tort of any other person, corporation, association or partnership, whether by negligence or willful intent of that other person, corporation, association, or partnership, and whether that injury shall have resulted fatally or otherwise, it shall be lawful for the plaintiff in the complaint to claim interest on the special damages alleged from the date of the occurrence of the act giving rise to the cause of action and it shall be the duty of the court, in entering judgment for plaintiff in that action, to add to the amount of damages assessed by the verdict of the jury, or found by the court, interest on that amount calculated at 8% per annum from the date of the occurrence of the act giving rise to the cause of action to the date of entering the judgment, and to include it in that judgment."

Utah Code Annotated, 1953, as amended, Section 78-27-44, became effective May 13, 1975. See Laws of 1975, Chapter 97.

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Utah Code Annotated, 1953, Section 68-3-3, provides:

> "No part of these revised statutes is retroactive, unless expressly so declared."

Three Utah cases have construed Utah law as requiring prospective application of the statute rather than retrospective application.

A 1944 case, <u>In re Ingraham's Estate</u>, 106 Utah 337; 148 P.2d 340; held:

> "Legislative enactments operate prospectively rather than retrospectively, unless expressly declared otherwise."

A 1947 case, <u>McCarrey v. Utah State Teachers' Retirement Board</u>, 177 P.2d 725, discussed the problem as follows:

> "Ordinarily legislative enactments are intended to operate prospectively and not retrospectively. As said in 50 Am. Jur. 494, Statutes, Section 478: 'The question whether a statute operates retrospectively, or prospectively only, is one of legislative intent. In determining such intent, the courts have evolved a strict rule of construction against a retrospective operation, and indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it to operate prospectively only, and not retroactively. Indeed, the general rule is that they are to be so construed, where they are susceptible of such interpretation and the intention of the legislature can be satisfied thereby, where such interpretation does not produce results which the legislature may be presumed not to have intended, and where the intention of the legislature to make the statute retroactive is not stated in express terms, or clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown by necessary implication or terms which permit no other meaning to be annexed to them, preclude all question in regard thereto, and leave no reasonable doubt thereof. Ordinarily, an intention to give a statute a retroactive operation will not be inferred. If it is doubtful whether the statute or amendment was intended to operate retrospectively, the doubt would be resolved against such operation."

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A 1958 case, Union Pacific Railroad Company v. Trustees, Inc., 8 Utah 2d 101; 329 P.2d 398; lays down the rule as follows:

> "As to any statutory question, Utah's policy demands the inclusion of any express authorization to justify any retrospective application of a statute."

As a note to this rule, the court explains:

> "Since 1898, in a number of compilations and revisions, lastly in Title 68-3-3, U.C.A., 1953, it has been enacted that "No part of these revised statutes is retroactive, unless expressly so declared."

The occurrence in the case at bar was September, 1973, and the application of Utah Code Annotated, 1953, as amended, Section 78-27-44, allowing interest on special damages retroactively would be contrary to Utah Code Annotated, 1953, Section 68-3-3, which provides:

> "No part of these revised statutes is retroactive, unless expressly so declared."

CONCLUSION

The contract between Eugene P. Campbell and State Farm Mutual Automobile Insurance Company, containing the release of Pearl Stagg, was plead as a bar to plaintiff's tort action, the execution of the contract being admitted and plead by plaintiff. The contract is a bar to plaintiff's action until it is rescinded.

To rescind a contract all parties interested in the contract must be joined. State Farm Mutual Automobile Insurance Company, as the insurer of defendant, has an interest in and is the contracting party of the contract that would have to be set

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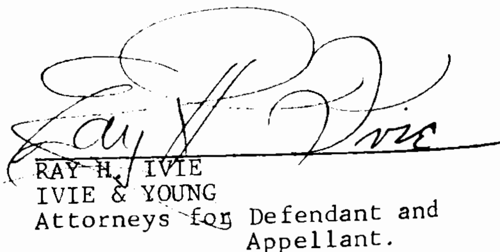
aside and therefore, is an indispensable party.

The evidence demonstrates that there was no mutual mistake of fact between plaintiff and LaVell Brown, agent for the insurance company, as to the fact that plaintiff suffered an injury to his neck and spine and therefore, as a matter of law, defendant is entitled to a reversal of the judgment of the lower court with a direction that the lower court enter a judgment "no cause for action" against plaintiff.

Plaintiff, with full knowledge of his neck injury, continued to receive the benefits of the contract by accepting payment from State Farm Mutual Automobile Insurance Company until after the present action was filed and therefore, he has ratified the contract between himself and State Farm Mutual Automobile Insurance Company.

The trial court, in error, has applied Utah Code Annotated, 1953, as amended, Section 78-27-44, allowing interest on special damages retroactively contrary to Utah Code Annotated, 1953, Section 68-3-3, which provides: "No part of these revised statutes is retroactive unless expressly so declared."

Respectfully submitted this 26th day of July, 1978.



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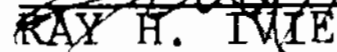
MAILING CERTIFICATE

I certify that on the 27th day of July, 1978, I mailed two (2) true and correct copies of the foregoing Brief of Appellant to Jackson Howard, Attorney for Respondent, 120 East 300 North, Provo, Utah 84601.



RAY H. IVIE

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